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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/596,754	08/20/2008	Raymond Clarke	14753-1US	8444
93049	7590	09/13/2011		
Axiom Global Inc. 75 Spring Street, Floor 8 New York, NY 10012			EXAMINER SMITH, CHAIM A	
			ART UNIT 1782	PAPER NUMBER
			NOTIFICATION DATE 09/13/2011	DELIVERY MODE ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jmcDonald@mcdonaldj.com  
jmcDonald@axiomlaw.net

## Office Action Summary

Application No.

10/596,754

Applicant(s)

CLARKE ET AL.

Examiner

CHAIM SMITH

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 June 2011 and 29 July 2011.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 5) ☒ Claim(s) 1-12, 15 and 19-25 is/are pending in the application.
- 5a) Of the above claim(s) 11, 12 and 21-23 is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 1-10, 15, 19, 20, 24, and 25 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☒ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

**DETAILED ACTION**

***Election/Restrictions***

1. Claims 11, 12, and 21 - 23 withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected invention, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in the reply filed on 01 June 2011.
2. In accordance with 37 CFR 1.499, applicant was required, in reply to this action, to elect a single invention to which the claims must be restricted. Applicant has elected Group I, claims 1 – 10, 15, 19, 20, 24, and 25.
3. The groups as amended are as follows:  
  
Group I, claims 1 – 10, 15, 19, 20, 24 and 25 drawn to a method of storing a respiring biological material.  
  
Group II, claims 11, 12, and 21 - 23 drawn to a sealed container.
4. The groups of inventions listed above do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features for the following reasons:
5. The technical feature linking the three inventions is the hydrophilic polymer composition and an auxiliary component, which combination does not provide a contribution over the prior art, as evidenced by Clarke US 6,376,032 who discloses a hydrophilic polymer composition in the form of a polymeric film and an auxiliary component through which pass oxygen and carbon dioxide, therefore, the technical

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feature is not a special technical feature and the claims are restrictable under 371 practice.

6. The restriction is hereby maintained.

***Priority***

7. Receipt is acknowledged of papers filed under 35 U.S.C. 119 (a)-(d) based on an application filed in the UNITED STATES on 23 December 2003. Applicant has not complied with the requirements of 37 CFR 1.63(c). Whilst the oath contains a claim of foreign priority benefits, the oath, declaration, or application data sheet does not acknowledge the filing of any foreign application but a PCT application based on a US provisional application. A new oath, declaration, or application data sheet is required in the body of which the present application should be identified by application number and filing date. Foreign priority can not be claimed based on the original filing of a non-foreign application, i.e. a US filed application.

***Information Disclosure Statement***

8. The listing of references in the specification is not a proper information disclosure statement. 37 CFR 1.98(b) requires a list of all patents, publications, or other information submitted for consideration by the Office, and MPEP § 609.04(a) states, "the list may not be incorporated into the specification but must be submitted in a separate paper." Therefore, unless the references have been cited by the examiner on form PTO-892, they have not been considered.

***Claim Rejections - 35 USC § 112***

9. The following is a quotation of the second paragraph of 35 U.S.C. 112:

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The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

10. Claim 21 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

11. Claim 21 depends from non-elected claim 11 and therefore has not been further examined on the merits. The status identifier should be changed to (new, withdrawn) in the next reply.

***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

14. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation

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under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

15. Claims 1 – 7, 10, 19, 20, 24, and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke US 6,376,032 in view of Nir et al. US 6,190,710.

16. Regarding claims 1 and 7, Clarke discloses a method of storing a respiring produce (broccoli) (col. 9, paragraph 3, and example 13), wherein the respiring biological material is stored in a packaging atmosphere within a sealed container which comprises an auxiliary component comprising a polymeric composition which is not an HYDROPHILIC POLYMER COMPOSITION, and through which pass oxygen and carbon dioxide entering or leaving the packaging atmosphere (col. 3, paragraph 5 continuing to col. 4).

17. Claims 1 and 7 differ from Clarke in the container having an interior surface at least part of which is composed of a particular hydrophilic polymer composition. Nir discloses a method of storing a respiring biological material (banana) ('710, col. 7, paragraph 4) in a packaging atmosphere in a sealed container which has an interior surface at least part of which is composed of a hydrophilic polymer composition (amides, esters) ('710, col. 1, Summary of the Invention). Nir is using a hydrophilic polymer composition to form a sealed container for the art recognized function of controlling the water vapor content generated by respiring biological materials in a controlled atmosphere package in order to at least increase shelf life and improve

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fungus resistance which is applicants' reason doing so as well. To therefore modify the sealed container of Clarke and use a hydrophilic polymer composition, such as a polyamide, would have been an obvious matter of choice and/or an obvious result effective variable.

18. Regarding claim 2, Clarke discloses the auxiliary component has an R ratio of at least 1.5 ('032, col. 3, paragraph 5 continuing to col. 4).

19. Regarding claim 3, Clarke in view of Nir discloses the hydrophilic polymer composition is in the form of a film having a window therein, and the auxiliary component covers the window (aperture) ('032, col. 8, paragraph 4).

20. Regarding claim 4, Clarke in view of Nir discloses the container comprises at least one first discrete section composed of the hydrophilic polymer composition (amides, esters ) ('710, paragraph 8) and at least one second discrete section composed of the second polymeric composition (microporous polymeric film) ('032, col. 3, paragraph 5 continuing to col. 4).

21. Regarding claim 5, Clarke in view of Nir discloses the hydrophilic polymer composition provides at least 50% of the interior surface of sealed container (the aperture can be, for example 5 to 50% of the total wall area of the container) ('032, col. 8, paragraph 4).

22. Regarding claim 6, it is well established that the preferred packaging atmosphere one would choose to provide in a packaging atmosphere would depend on the particular respiring biological material would choose to seal in the container. Nevertheless, Clarke discloses a packaging atmosphere would have an oxygen content of 2% and a carbon

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dioxide content of 5% ('032, col. 1, paragraph 6) and Nir discloses suitable packaging atmospheres would have an oxygen content of 4 – 5% oxygen and 5 – 10% carbon dioxide.

23. Regarding claim 10, Clarke in view of Nir discloses the respiring biological material to be bananas ('710, col. 9, paragraph 3).

24. Regarding claims 19 and 20, Clarke in view of Nir discloses the hydrophilic polymer composition is in the form of a film having a window (aperture) therein, the auxiliary component covers the window ('032, col. 8, paragraph 4), is an atmosphere control member having a R ratio of at least 1.5 (col. 3, paragraph 5 continuing to col. 4), and comprises a microporous film having a coating of the non-hydrophilic polymer composition polymeric material thereon ('032, col. 2, paragraph 3). Further regarding claim 20, Clarke in view of Nir discloses the hydrophilic polymer composition would be in the form of a polyester film (the composition of the plastic packaging material includes . . . homopolymers or copolymers containing . . . esters" ('710, col. 1 paragraph 13) and the non-hydrophilic polymer composition comprises a side chain crystalline polymer ('032, col. 6, paragraph 1).

25. Claims 24 and 25 are rejected for the same reasons given above in the rejections of claims 1, 19, and 20.

26. Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke US 6,376,032 in view of Nir et al. US 6,190,710 in view of applicants admission of the prior art.



27. Regarding claims 8 and 9, applicants disclose a preferred film for the hydrophilic polymer composition of the container to be the hydrophilic polymer composition of Clarke in view of Nir (disclosure, page 5, paragraph 2). Since the hydrophilic polymer composition film of Clarke in view of Nir is the same film applicants disclose as being used in the container, it would be expected that a film consisting of the hydrophilic polymer composition of Clarke in view of Nir would, when exposed at 23° C to an atmosphere having a relative humidity of 50%, would have an equilibrium water content of at least 2.4%, by weight, based on the dry weight of the composition as claimed (MPEP 2112.01 II.).

28. Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Clarke US 6,376,032 in view of Nir et al. US 6,190,710 as further evidenced by Suga JP 7-257660.

29. Regarding claim 15, once it was known to use a hydrophilic polymer composition in the packaging of respiring biological material in a sealed container as disclosed by Clarke in view of Nir, the particular type of hydrophilic polymer composition one would choose to employ in the container would have been an obvious matter of choice based on the particular atmospheric requirements of the respiring biological material one would want to seal in the container. Selection of a known hydrophilic polymer composition to make a container from a type of hydrophilic polymer composition previously known would have been obvious (MPEP § 2144.07). Nevertheless, as further evidenced by Suga, the use of polylactic acid to make a sealed container in which to store a respiring biological material was conventional and well established.

***Conclusion***

30. Any inquiry concerning this communication or earlier communications from the examiner should be directed to CHAIM SMITH whose telephone number is (571)270-7369. The examiner can normally be reached on Monday-Thursday 7:30-5:00.

31. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on 571-272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

32. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/C. S./  
Chaim Smith  
Examiner, Art Unit 1782  
04 September 2011

/Rena L. Dye/  
Supervisory Patent Examiner, Art Unit 1782